

AN EXAMINATION OF THE LEGAL AUTHORITY FOR THE
1999 NATO AIR CAMPAIGN AGAINST
THE FEDERAL REPUBLIC OF YUGOSLAVIA

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I. INTRODUCTION.....	1
II. BACKGROUND.....	3
A. THE KOSOVO AIR CAMPAIGN BEGINS.....	3
B. UNSC RESOLUTIONS PRECEDING THE KOSOVO AIR CAMPAIGN.....	3
C. NATO'S JUSTIFICATION	5
D. CONCLUSION OF THE KOSOVO AIR CAMPAIGN	6
III. SOURCES AND CHARACTERISTICS OF INTERNATIONAL LAW	7
A. SOURCES	7
B. CUSTOMARY INTERNATIONAL LAW	7
C. CHANGE IN CUSTOMARY INTERNATIONAL LAW.....	9
D. JUS COGENS: A SPECIAL CATEGORY OF CUSTOMARY INTERNATIONAL LAW	10
E. TREATY LAW	11
F. OTHER SOURCES OF INTERNATIONAL LAW	12
IV. INTERNATIONAL LAW ON THE USE OF FORCE.....	12
A. PRE-U.N. CHARTER.....	12
B. U.N. CHARTER TO THE PRESENT	14
V. U.N. CHARTER: RELEVANT PROVISIONS	15
A. PREAMBLE.....	15
B. ARTICLE 1.....	16
C. ARTICLE 2(1).....	16
D. ARTICLE 2(4).....	17
E. ARTICLE 2(7)	17
F. ARTICLE 25	18
G. ARTICLE 27(3).....	18
H. ARTICLE 34.....	19
I. ARTICLE 39	19
J. ARTICLE 41.....	19
K. ARTICLE 42.....	20
L. ARTICLE 48(1)	20
M. ARTICLE 48(2)	20
N. ARTICLE 51.....	20
O. ARTICLE 52(1).....	21
P. ARTICLE 53(1).....	21
Q. ARTICLE 54.....	22
R. ARTICLE 55(C).....	22
S. ARTICLE 103	22
VI. HUMANITARIAN INTERVENTION IN GENERAL.....	22
A. DEFINITION AND CONCEPTS	22
B. THE LAW OF NON-INTERVENTION	23
C. THE HISTORY OF CUSTOMARY LAW ON HUMANITARIAN INTERVENTION	24
D. RECENT PRACTICE CONCERNING HUMANITARIAN INTERVENTION	25
E. ARGUMENTS AGAINST A RIGHT OF HUMANITARIAN INTERVENTION	26
F. ARGUMENTS FOR A RIGHT OF HUMANITARIAN INTERVENTION	27
VII. HUMANITARIAN INTERVENTION IN KOSOVO	29
A. ARGUMENTS AGAINST NATO'S INTERVENTION	29

B. ARGUMENTS FOR NATO'S INTERVENTION	30
VIII. THEORIES FOR JUSTIFYING THE USE OF FORCE IN THE KOSOVO AIR.....	33
VIII. CAMPAIGN.....	33
A. ARTICLE 2(4): EXPLICIT CONDITIONS ON SCOPE.....	33
B. THE FAILURE OF THE CHARTER'S COLLECTIVE SECURITY SYSTEM.....	35
C. EMERGING CUSTOMARY LAW OF HUMANITARIAN INTERVENTION AND U.N. CHARTER RE-INTERPRETATION..	37
D. SOVEREIGNTY.....	38
IX. CONCLUSION	39

I. INTRODUCTION

My reasons for writing this article are twofold: first, to fulfill the requirements of the State Department Senior Seminar and the Air Force National Defense Fellows Program, and second, to satisfy my professional interest in an issue that I worked on when I was assigned to the U.S. Mission to NATO Headquarters in Brussels, Belgium. As policy and legal advisor, I was at NATO Headquarters for the Kosovo air campaign and I participated in the discussions of the legal justification for NATO's use of force against the Federal Republic of Yugoslavia (FRY).

My objective for this article is to investigate the legal authority for NATO's use of force against the FRY during the Kosovo air campaign. The easy answer to this issue is that there is no legal authority. This is because the prevailing legal view is that the United Nations (U.N.) Charter states customary international law on the use of force and limits the use of force to two situations: self-defense if an armed attack occurs and when authorized by a U.N. Security Council (UNSC) resolution.

The easy answer seems inadequate. Atrocities were being committed in Kosovo by agents of the FRY government, the international community had condemned the atrocities and unsuccessfully demanded that they cease, diplomatic efforts to end the atrocities had failed, and UNSC authorization to intervene was unavailable. At least 19 nations believed that it was necessary to use military force to stop the atrocities.

This article looks beyond the prevailing legal view on the use of force and searches for legal authority that could be used to justify the Kosovo air campaign. Because such authority will most likely arise through the creation of new customary international law¹ and because the decision to create new customary international law is a political one to be made by government policy makers, this paper is written for policy makers rather than lawyers.

To assist the policy makers understand the legal theories on the use of force I have provided a short description of the sources and characteristics of international law², a brief history of the international law on the use of force³, and a description of relevant U.N. Charter provisions⁴.

In the Autumn 1999 NATO Review, Ove Bring argues that the governments of the NATO member states that participated (all 19 NATO nations agreed to conduct the air campaign but not all nations contributed forces used in the campaign) in the Kosovo air campaign need to produce the justification(s) for the air campaign.⁵ According to Bring, any group of states that detracts from the Charter's prohibition on the use of force should provide a legal explanation for its acts.⁶ The legal explanation is needed to determine whether NATO's action should be looked upon as illegal, as an exceptional deviation from international law, as an action based upon a new interpretation of the U.N. Charter in line with modern international law, or as an attempted change to customary international law to create an exceptional right to use force for humanitarian intervention.⁷

¹ See *infra* Part III.

² See *infra* Part III.

³ See *infra* Part IV.

⁴ See *infra* Part V.

⁵ Ove Bring, *Should NATO Take the Lead in Formulating a Doctrine on Humanitarian Intervention?*, NATO Review Autumn 1999, Web Edition, www.nato.int.

⁶ *Id.*

⁷ *Id.*

Because this article is being written as part of the State Department Senior Seminar, its scope is limited by the resources available and the time allowed for the research and writing. The only issue to be addressed is the legal authority for NATO's use of force against the FRY during the Kosovo air campaign (*jus ad bellum*). An extensive discussion of the facts surrounding the Kosovo air campaign⁸, the details of the air campaign, the law of war applicable to the conduct of the air campaign⁹, and the events following the air campaign are beyond the scope of this article.

When examining the legal authority for the use of force by NATO in the FRY, the related legal issues of state sovereignty, non-intervention in the domestic affairs of a sovereign state, human rights, and humanitarian intervention must be considered. As will be explained *infra*, these four issues are really two pairs of issues: first, a sovereign state has absolute control over its domestic issues and other states are prohibited from intervening in those issues; second, all humans have certain legal rights (i.e., freedom from genocide, torture, and slavery) and when the government of a sovereign state denies these rights to its citizens, other states may have the right to intervene to restore those rights.

The specific legal issue to be addressed in this article is whether the NATO states, either individually or collectively, had legal authority to use force against another sovereign state, the FRY, to intervene in the domestic violation of the human rights of FRY citizens by the FRY government. In order to more easily understand the legal issue, some background factual and legal information is provided. Part II provides background information on the Kosovo air campaign and the relevant UNSC resolutions. Part III describes the characteristics of customary international law and treaties, the two primary sources of international law. Unlike domestic law which is codified into statutes or is found as common law in court decisions, international law is less well articulated and can be more difficult to ascertain.

Part IV provides a brief history of the law on the use of force. The discussion is bifurcated into the periods before and after the U.N. Charter. This is because the U.N. Charter has become the preeminent authority on the use of force. Also because of the importance of the U.N. Charter, Part V reviews the provisions of the Charter relevant to the use of force, sovereignty, and human rights. The Charter's strong support for both sovereignty and human rights creates a dilemma when, as happened in Kosovo, the sovereign violates its citizen's human rights.

Part VI introduces the concept of humanitarian intervention as an exception to the prohibition on interfering with the domestic issues of another state and to the prohibition on the use of force except in self-defense or with UNSC authorization. Although there are many proffered definitions for humanitarian intervention, in the Kosovo context humanitarian intervention means NATO's air campaign to stop the atrocities being committed by the FRY government against Albanian Kosovars. The law of humanitarian intervention is evolving and jurists are divided over whether humanitarian intervention should be legal and, if so, what criteria

⁸ See Ruth Wedgwood, *Editorial Comments: NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 A.J.I.L. 828, 828-9 (1999) (for a summary of the facts leading to the Kosovo air campaign). See also Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 A.J.I.L. 161 (1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, Eur. J. Int'l L., www.ejil.org/journal/Vol10/No1/ab1.html.

⁹ *jus in bello*, i.e., necessity, proportionality, non-combatant immunity, etc.

must be met before intervention is permitted. Their primary concern is that a new exception to the prohibition on the use of force could be abused. Arguments for and against a legal right of humanitarian intervention are provided.

Part VII summarizes legal arguments opposing and supporting NATO's intervention in the FRY. Part VIII reviews some emerging legal theories which could provide legal authority for the Kosovo air campaign. Although none of these arguments has been accepted as overcoming the preeminent authority of the U.N. Charter on the use of force, they are part of the evolution of international law. The conclusion notes that policy makers, especially U.S. policy makers, have, as a result of the Kosovo air campaign, the opportunity to substantially influence the evolution of international law on humanitarian intervention.

II. BACKGROUND

A. The Kosovo Air Campaign Begins

On March 24, 1999 the NATO nations began the Kosovo air campaign against the FRY to prevent more human suffering, repression, and violence against the civilian population of Kosovo.¹⁰ The NATO objective was also to prevent instability from spreading in the region.¹¹ The "air operations in the FRY" were directed towards disrupting the violent attacks being committed by the Serb Army and Special Police Force against Kosovar Albanians.¹²

The Kosovo air campaign was preceded by intense diplomatic efforts and UNSC involvement.¹³ The UNSC adopted four resolutions prior to the air campaign (Resolutions 1160, 1199, and 1203, and 1239), three of which were under Chapter VII (Resolutions 1160, 1199, and 1203).¹⁴

B. UNSC Resolutions Preceding the Kosovo Air Campaign

UNSC resolutions create legally binding obligations for U.N. members when taken pursuant to the UNSC's authority under Chapter VII of the Charter.¹⁵ The UNSC issued three resolutions under Chapter VII between March 31, 1998 and October 24, 1998 (Resolutions 1160,

¹⁰ NATO Press Release (1999)040 23 March 1999, statement by Dr. Javier Solana, Secretary General of NATO. See also Christine Chinkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo: A "Good" or "Bad" War?*, 93 A.J.I.L. 841 n. 2 (1999); Richard Falk, *Editorial Comments: NATO's Kosovo Intervention: Kosovo, World Order, and the Future of International Law*, 93 A.J.I.L. 847, 850 (1999).

¹¹ NATO Press Release (1999)040 23 March 1999, statement by Dr. Javier Solana, Secretary General of NATO.

¹² *Id.*

¹³ Jonathan Charney, *Commentary: Anticipatory Humanitarian Intervention in Kosovo*, 32 Vand. J. Transnat'l L. 1231, 1233 (1999).

¹⁴ Chapter VII is titled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Chapter VII provides the legal authority for the UNSC to take measures, including the use of force, to maintain or restore international peace and security. *Id.*

¹⁵ See *infra* Part V discussion of Articles 39, 43, and 48.

1199, 1203). During the Kosovo air campaign, the UNSC also issued a non-binding resolution (Resolution 1239, 14 May 1999). The key provisions of those resolutions are described below.¹⁶

UNSC Resolution 1160, S/RES/1160, March 31, 1998 condemns the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo and all acts of terrorism by the KLA. It affirms the commitment of all member states to the sovereignty and territorial integrity of the FRY. Acting under Chapter VII, it calls for the FRY to find a political solution to the Kosovo issue, agrees that a solution should be based on the territorial integrity of the FRY, imposes an arms embargo on the FRY, including Kosovo, and seeks withdrawal of FRY special police units and cessation of action by the security forces affecting the civilian population.

UNSC Resolution 1199, S/RES/1199, September 23, 1998 expresses grave concerns at recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army resulting in numerous civilian casualties and displacement of over 230,000 persons from their homes. It expresses concern about reports of continuing violations of Resolution 1160 and expresses deep concern about the rapid deterioration in the humanitarian situation throughout Kosovo. It also expresses concern about reports of increasing violations of human rights and of international humanitarian law. It reaffirms the sovereignty and territorial integrity of the FRY. Acting under Chapter VII, the UNSC demands a cease fire and steps to improve the humanitarian situation, adds specific measures beyond Resolution 1160 to achieve a political solution, including cessation of all action by security forces and withdrawal of security forces used for civilian repression, and insists that Kosovo Albanian leadership condemn all terrorist action and use peaceful means only.

UNSC Resolution 1203, S/RES/1203, October 24, 1998 welcomes the establishment of an OSCE Kosovo verification mission and a NATO air verification mission over Kosovo, reaffirms that the primary responsibility for maintenance of international peace and security is conferred on the UNSC, condemns all acts of violence by any party as well as terrorism, expresses concern at the continuing violations of the prohibitions imposed by Resolution 1160, expresses deep alarm at the continuing grave humanitarian situation throughout Kosovo, reaffirms the sovereignty and territorial integrity of the FRY, and affirms that the unresolved situation in Kosovo constitutes a continuing threat to peace and security in the region. Acting under Chapter VII, the UNSC demands compliance with Resolutions 1199 and 1160 by the FRY, the Kosovo Albanian leadership, and all elements of the Kosovo Albanian community; and demands that these entities cooperate with the OSCE Verification Mission in Kosovo. Also under Chapter VII, the UNSC insists that the Kosovo Albanian leadership condemn all terrorist actions, demands that such actions cease immediately, and demands that FRY authorities and Kosovo Albanian leadership cooperate to avert the impending humanitarian catastrophe.

UNSC Resolution 1239, S/RES/1239, May 14, 1999 notes that the UNSC is guided by the Universal Declaration of Human Rights and international covenants and conventions on human rights, expresses grave concern at the humanitarian catastrophe in and around Kosovo as a result of the continuing crisis, reaffirms the territorial integrity and sovereignty of all States in the region, commends states and organizations for providing humanitarian relief and calls for continued assistance, and emphasizes that the humanitarian situation will continue to deteriorate in the absence of a political solution to the crisis.

¹⁶ See Ruth Wedgwood, *Editorial Comments: NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 A.J.I.L. 828, 829-30 (1999).

These UNSC Resolutions, beginning almost one year prior to the Kosovo air campaign, chronicle the UNSC's attempt to impose a political solution to the Kosovo crisis. The earlier resolutions impose legally binding obligations under Chapter VII and subsequent resolutions note that such obligations have not been fulfilled. At the same time, they reaffirm the sovereignty and territorial integrity of the FRY and reaffirm that the UNSC has primary responsibility for the maintenance of international peace and security.

UNSC Resolution 1203 finds that the situation in Kosovo constitutes a continuing "threat to peace and security" in the region. Having made such a finding, the UNSC may authorize the use of force to maintain or restore international peace and security.¹⁷ However, Russia made it clear that it would veto any resolution that authorized the use of force against the FRY.¹⁸ This promise of a Russian veto eliminated NATO's only possibility of obtaining legal authority for the use of force to resolve the Kosovo crisis¹⁹

C. NATO's Justification

Although there was consensus within NATO to undertake the Kosovo air campaign and the issue of legal authority was extensively debated within NATO²⁰, there was no stated NATO legal justification for the use of force and it was up to the governments of the participating member states to assess the international law situation and produce the justifications they saw fit.²¹ An unpublished letter from the NATO secretary-general to the NATO permanent representatives on October 9, 1998 stated:

"The relevant main points that have been raised in our discussion yesterday and today are as follows:

The FRY has not yet complied with the urgent demands of the International Community, despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter. The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned *inter alia* of the danger of an [sic] humanitarian disaster in Kosovo. The continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful

¹⁷ See *infra* discussions of Articles 39 and 42 in Part V.

¹⁸ Ruth Wedgwood, *Editorial Comments: NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 A.J.I.L. 828, 831 (1999); Christine Chinkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo: A "Good" or "Bad" War?*, 93 A.J.I.L. 841, 842 (1999); Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 A.J.I.L. 161, 169 (1999).

¹⁹ See *infra* Part IV discussion of the history of the legal uses of force. There was no suggestion that the self-defense justification was applicable.

²⁰ Murphy, *supra* note 18, at 169.

²¹ Bring, *supra* note 5.

solution of the crisis have been taken by the FRY. The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future. The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199.

On the basis of this discussion, I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force."²²

Throughout the air campaign, NATO offered no legal justification for its action and NATO has not since justified its actions on the basis of a specific rule of law or emerging legal theory such as humanitarian intervention.²³ Only in the suits filed in the International Court of Justice (ICJ) against the participating NATO states did NATO members begin to articulate legal justifications.²⁴ Only Belgium even mentioned humanitarian intervention as a legal justification and then merely as a possible justification.²⁵

D. Conclusion of the Kosovo Air Campaign

On June 10, 1999 the Kosovo air campaign ceased following completion of the Military-Technical Agreement (MTA) between NATO and the FRY.²⁶ The MTA authorized deployment into Kosovo of an international security force (KFOR) to occur after the adoption of a resolution already introduced in the UNSC.²⁷

UNSC Resolution 1244, S/RES/1244, June 10, 1999, acting under Chapter VII, authorizes deployment in Kosovo, under U.N. auspices, international civil and security presences with the security presence having substantial NATO participation. It authorizes member states and relevant international organizations to establish the international security presence in Kosovo "with all necessary means" to fulfill its responsibilities listed in the Resolution. The phrase "all

²² Simma, *supra* note 8.

²³ Charney, *supra* note 13, at 1238-9; Thomas Franck, *Editorial Comments: NATO's Kosovo Intervention: Lessons of Kosovo*, 93 A.J.I.L. 857, 859 (1999); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?*, Eur. J. Int'l L., www.ejil.org/journal/Vol10/No1/com.html.

²⁴ Charney, *supra* note 13, at 1239.

²⁵ *Id.*

²⁶ NATO Press Release (1999)093, 10 June 1999, Statement by NATO Secretary General Dr. Javier Solana on suspension of air operations, www.nato.int.

²⁷ Military-Technical Agreement Between the International Security Force ("KFOR") and The Governments of Federal Republic of Yugoslavia and The Republic of Serbia, Article 1, paragraphs 1, 2.

necessary means" is the UNSC's established terminology for authorizing the use of force.

Although NATO's air campaign in Kosovo was conducted without UNSC authorization for the use of force, NATO's KFOR operation in Kosovo is authorized to use force when fulfilling its responsibilities under UNSC Resolution 1244.²⁸ To avoid a veto, UNSC Resolution 1244 did not explicitly retroactively legitimize NATO's actions but only prospectively authorized foreign states to intervene in the FRY to maintain the peace.²⁹

III. SOURCES AND CHARACTERISTICS OF INTERNATIONAL LAW

A. Sources

Article 38(1) of the Statute of the ICJ is widely recognized as the most authoritative statement on the sources of international law.³⁰ Article 38(1) recognizes the following sources of international law: (1) international conventions (treaties), whether general or particular, establishing rules expressly recognized by the contesting parties; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; and (4) subject to the provisions of Article 59, judicial decisions³¹ and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. The two primary sources of international law, customary international law and treaties, are discussed below.

B. Customary International Law

As the name suggests, customary international law evolves from customary practices that have become so widespread and consistently followed that they have become recognized as law. Customary international law is a general practice of states that is accepted as law by those states.³² It is created by the actual behavior of states and the psychological or subjective belief by the state that such behavior is legally required.³³ The existence of customary international law is deduced from the practice and behavior of states.³⁴

²⁸ Paragraph 9 of UNSC Resolution 1244 lists KFOR's responsibilities which include deterring renewed hostilities, maintaining and where necessary enforcing a cease fire, and ensuring the withdrawal and preventing the return into Kosovo of FRY military, police, and paramilitary forces except as otherwise provided in the Resolution.

²⁹ Charney, *supra* note 13, at 1233.

³⁰ Malcolm Shaw, *International Law* 55 (1997). Article 92 of the U.N. Charter makes the ICJ the principal judicial organ of the U.N. and the Statute (treaty) establishing the ICJ is an integral part of the U.N. Charter. However, the ICJ can only hear cases where all of the parties voluntarily accept the ICJ's jurisdiction. The ICJ cannot compel states to appear before it nor can it enforce its judgments. *Id.* at 3.

³¹ Article 59 of the Statute of the ICJ limits the binding force of ICJ decisions to the particular case before the court and to the parties to the case.

³² Shaw, *supra* note 30, at 58.

³³ *Id.*

³⁴ *Id.* at 57.

There is a minimum but unspecified duration for a practice to exist before it can become customary law.³⁵ The duration depends on the circumstances involved and the nature of the practice.³⁶ However, duration is not the most important of the behavioral criteria for forming new law.³⁷ It is more important for the practice to be extensive among numerous states and virtually uniform.³⁸ However, rigorous conformity with the purported law is not required.³⁹ In addition, if the emerging law is changing an existing law, the strength of the existing law could increase the duration, extent, and uniformity required of the new practice before it becomes law.⁴⁰

Some states are more influential and powerful than others and their activities should be regarded as of greater significance in the formation of new law.⁴¹ This is reflected in international law so that customary law may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power, or because of their special relationship with the subject matter of the practice.⁴² The practice of "specially affected states" such as nuclear powers, other major military powers, and occupying and occupied states which have an established practice of statements, practice, and policy, is strong evidence of the existence of customary international law.⁴³

Conversely, for a practice to be accepted and recognized as law it must have the concurrence of the major powers in that particular field.⁴⁴ Accordingly, the duration and generality of the practice of an emerging law may be less important than the relative importance of the states participating in the formulation of the new law.⁴⁵ Universality of practice by all states is not required but some correlation with the practice of the more powerful states in the particular field is required.⁴⁶

In addition to the practice of states, formation of a new law requires that the practice be performed with a subjective belief that the practice is legally required. A state's practice that is done out of courtesy, reciprocity, or for any reason other than because the state believes that it is legally obligated to perform that practice, does not contribute to the formation of international law. Any act or statements by a state from which views about customary laws may be inferred are used to determine whether the subjective intent required for the formation of new law is present.⁴⁷ In determining whether the necessary subjective belief exists for the formation of customary law, the primary evidence of such belief is from official pronouncements of states, military manuals, and judicial decisions.⁴⁸

³⁵ *Id.* at 60.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 61.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 62.

⁴² *Id.* at 62-63.

⁴³ Theodor Meron, *Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law*, 93 A.J.I.L. 238, 249 (1996).

⁴⁴ Shaw, *supra* note 30, at 63.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 66.

⁴⁸ Meron, *supra* note 43, at 240.

This subjective belief that the practice is required by law is called the *opinio juris*.⁴⁹ Jurists who emphasize the importance of sovereignty stress the paramount importance of the *opinio juris* for customary law formation because sovereign states are only bound to what they have consented to.⁵⁰ For them, the *opinio juris*, or belief that a state practice is legally required, is the factor which turns the usage into a custom and makes it part of international law.⁵¹

C. Change in Customary International Law

The great problem with the *opinio juris* is that if it requires states to behave in accordance with existing law, how can new customary rules be changed since that obviously requires action different from or contrary to what until then is regarded as law?⁵² Thus international law must be treated as a process whereby states behave in a certain way in the belief that such behavior is law or is becoming law.⁵³ It will then depend upon how other states react to new practices as to whether this process of creating new customary law is accepted or rejected.⁵⁴

Customary international law is established by a pattern of practice, the absence of protest by states particularly interested in the practice, and acquiescence by other states.⁵⁵ Generally, where states are seen to acquiesce in the practice of other states without protesting against them, they are assumed to have accepted such practice as legitimate.⁵⁶ However, it is unrealistic to expect every state to react to every act of every other state.⁵⁷ Where a new rule which contradicts a prior rule is maintained by a large number of states, the protests of a few states would not overrule it, and the absence of reaction by other countries would reinforce it.⁵⁸

In contrast to where new customary law fills a void where there was no previous law, the problem of one or more states seeking to change existing law by adverse practice coupled with the acquiescence or non-reaction of other states remains unsettled.⁵⁹ State practice contrary to existing customary law can initiate creation of new law.⁶⁰ If other states endorse the emerging law, the previous law will be replaced, or there could be a period of time during which the two laws co-exist until one of them is generally accepted (as was the position for many years with regard to the limits of the territorial sea).⁶¹ The violation of customary law may contain the beginning of a new rule, but that depends on what the other nations will do in response.⁶² If they accept the violation, a new customary rule is being formed.⁶³ But if they label it a violation and punish the transgressor, then instead of a new rule beginning, the original customary rule is

⁴⁹ Shaw, *supra* note 30, at 59.

⁵⁰ *Id.*

⁵¹ *Id.* at 67.

⁵² *Id.* at 69.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 70.

⁵⁶ *Id.*

⁵⁷ *Id.* at 71.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 72.

⁶¹ *Id.*

⁶² Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 Colum. L. Rev. 1110, 1118 (1982).

⁶³ *Id.*

reinforced.⁶⁴

The ICJ has recognized that practice by a state in reliance on a novel right or an unprecedented exception to international law might, if that supported by other states, tend towards a modification of customary international law.⁶⁵ The difficulty in this kind of approach is that it is sometimes hard to determine when one rule supersedes another, but that is a complication inherent in the nature of customary international law.⁶⁶ Change in customary international law is rarely smooth but rather spasmodic.⁶⁷

D. *Jus Cogens*: A Special Category of Customary International Law

Within the set of customary international law, the international community of states recognizes a subset of "peremptory norms" from which no derogation is permitted and which may be modified only by a subsequent law recognized as a peremptory norm.⁶⁸ These peremptory norms of international law are called *jus cogens*.⁶⁹ The prohibitions on the unlawful use of force, genocide, slave trading, and piracy are examples of *jus cogens*.⁷⁰

There is a two step procedure for the formulation of *jus cogens*.⁷¹ The first step is the establishment of the practice as customary international law and second step is acceptance of that rule as a peremptory norm by the international community of states as a whole.⁷² The second step requires recognition of the customary international law as *jus cogens* by an overwhelming majority of states, crossing ideological and political boundaries.⁷³

As with international law in general, there are different views on the effect of laws recognized as *jus cogens*. One author notes that even international rules of *jus cogens*, or peremptory norms, are no more important than other rules, for these are simply rules that deny the validity of certain substantive provisions that might be included in treaties.⁷⁴

⁶⁴ *Id.*

⁶⁵ Shaw, *supra* note 30, at 69.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 97. Article 53 of the Vienna Convention on the Law of Treaties states: "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Shaw states that only rules based on custom or treaties may form the basis for *jus cogens*. *Id.* However, because treaties are only binding on their parties, before a treaty law could become *jus cogens* it would seem necessary for it to become customary international law.

⁷³ Shaw, *supra* note 30, at 97.

⁷⁴ D'Amato, *supra* note 62, at 1116-7. D'Amato's reference to the effect of *jus cogens* on treaties is discussed *infra* in Part III(E) discussing treaty law in relation to Article 53 of the Vienna Convention on the Law of Treaties.

E. Treaty Law

Treaties are the other primary source of international law. Treaties are a more modern and more deliberate method of creating law than through custom.⁷⁵ Treaties are written agreements whereby the participating states bind themselves legally to act in a particular way or to set up particular relations between themselves.⁷⁶ Unlike customary law which is regarded as a form of tacit agreement, treaties require the express consent of the contracting parties.⁷⁷ Also unlike customary international law, which is legally binding on all states, a treaty creates legally binding obligations only for the states that sign and ratify it (the parties to the treaty).⁷⁸

Where treaty provisions are identical to customary law, treaty parties have two sources for their legal obligations: one in customary international law and one in the treaty. Non-parties are bound only by customary international law.⁷⁹ Where a treaty provision is identical to a customary law, the latter will not be simply absorbed within the former but will maintain its separate existence.⁸⁰ Customary law continues to exist and to apply separately from treaty law, even where the two laws are identical.⁸¹ Two laws with the same content may be subject to different interpretation and practice, and the practice of those laws may diverge over time.⁸²

Treaties can create customary law if non-parties adopt a practice established by the a treaty with the necessary *opinio juris*.⁸³ This requires that parties and non-parties to the treaty adhere to the treaty practice because they believe they are legally required to do so.⁸⁴ The effectiveness of this procedure depends on the nature of the treaty, the number of participants, and other relevant factors.⁸⁵ However, no writer has come forth with any mechanism for determining the time when a treaty provision becomes customary law.⁸⁶ One scholar asserts that the vast majority of customary international law began as provisions in treaties.⁸⁷

The Vienna Convention on the Law of Treaties is an example of a treaty whose provisions are generally recognized as customary international law.⁸⁸ It was written by the International Law Commission, a body of the U.N., for the purpose of codifying customary law

⁷⁵ Shaw, *supra* note 30, at 73.

⁷⁶ *Id.* at 73-74.

⁷⁷ *Id.* at 74.

⁷⁸ *Id.* at 75. To avoid unduly complicating this article, I have omitted consideration of the "persistent objector" exception to the rule that customary international law is binding on all states and I have omitted the extremely rare situation where a treaty may create obligations for third parties.

⁷⁹ Shaw, *supra* note 30, at 75. The inclusion of the law in the treaty reaffirms the status of the law as customary.

⁸⁰ Meron, *supra* note 43, at 246 citing *Nicaragua*, 1986 ICJ Rep. at 95, para. 178.

⁸¹ Shaw, *supra* note 30, at 76.

⁸² *Id.*

⁸³ *Id.* at 75.

⁸⁴ *Id.* at 76.

⁸⁵ *Id.* at 75.

⁸⁶ D'Amato, *supra* note 62, at 1139.

⁸⁷ *Id.* at 1130 referencing his book cited in n. 82 as proof.

⁸⁸ David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. Chi. L. Rev. 607, 618 (1995).

on treaties. Article 53 of the Vienna Convention on the Law of Treaties states that a treaty will be void (have no legal effect) "if at the time of its conclusion, it conflicts with a peremptory norm of general international law" (*jus cogens*). An existing treaty which conflicts with an emerging rule of *jus cogens* terminates when the rule emerges.⁸⁹

F. Other Sources of International Law

With two exceptions, ICJ decisions and scholarly writings, the other sources of international law referenced in Article 38 of the Statue of the ICJ are not relevant for this article. These other sources are local custom⁹⁰, general principles of law, including equity⁹¹, judicial decisions⁹², and the writings of legal scholars⁹³. Because of the paucity of case law and the political character of governmental positions, the expert opinions of legal scholars can be an important means for ascertaining international law.⁹⁴

IV. INTERNATIONAL LAW ON THE USE OF FORCE

A. Pre-U.N. Charter

Between the time of St. Augustine (354-430) and World War I, war was considered a fact of life; collective military intervention into smaller states was used by the larger empires to keep the established power distributed among the larger states.⁹⁵ Resort to war was often justified by the doctrine of the "just war" which arose with the increasing power of Christianity and declined with the outbreak of the inter-Christian religious wars and the establishment of an order of secular sovereign states.⁹⁶ The just war doctrine emerged from a desire to protect the church and to spread Christianity.⁹⁷

A just war is one that is fought with the right intention by the sovereign (i.e., peace and justice, not revenge) and is waged for a just cause.⁹⁸ A just cause could be either self-defense or

⁸⁹ Shaw, *supra* note 30, at 97 citing Article 64 of the Vienna Convention on the Law of Treaties.

⁹⁰ Shaw, *supra* note 30, at 72-73.

⁹¹ *Id.* at 77-86.

⁹² *Id.* at 86-88.

⁹³ *Id.* at 88-89.

⁹⁴ Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. Chi. L. Rev. 113, 122 (1986).

⁹⁵ Michael Roch, *Military Intervention in Bosnia-Herzegovina: Will World Politics Prevail Over the Rule of International Law?*, 24 Denv. J. Int'l L. & Pol'y 461, Lexis LAWREV, ALLREV file (1996).

⁹⁶ Shaw, *supra* note 30, at 779.

⁹⁷ Michael Schmitt, *The Confluence of Law and Morality: Thoughts on Just War*, 3 USAFA J. Leg. Stud. 91, 96 (1992).

⁹⁸ David Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 Ariz. J. Int'l & Comp. Law 45, Lexis LAWREV, ALLREV file (1994) citing Stanley Hoffmann, *Duties Beyond Borders* 48 (1981); Byron Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 Utah L. Rev. 269, 307 (1994), a war is just only if the good sought outweighed the evil the war would cause.

a cause of sufficient concern to the community of mankind such as redressing a serious injury to one's people or one's possessions.⁹⁹ One theory of the just war included seven requirements relating to the use of force (*jus ad bellum*) and two requirements relating to the methods of employing force (*jus in bello*).¹⁰⁰

International law tolerated unilateral resort to force for a simple and ineluctable reason: in the absence of organized community structures for enforcing international rights and, where appropriate, changing them, aggrieved states had no alternative but recourse to their own means.¹⁰¹ Many of those who deplored this situation acknowledged that there was no alternative other than self-help, conducted with the amount of force the self-helper deemed appropriate.¹⁰² Before the League of Nations era, states were free to use force and to go to war for any reason or for no reason.¹⁰³ In this world of empires, a limit on the legitimate uses of force like Article 2(4) of the U.N. Charter would have been an implausible utopian expression had it stood by itself without an organized structure for enforcing international rights.¹⁰⁴

After World War I, the League of Nations required that states settle their disputes without war.¹⁰⁵ Intervention with force was only permitted as a last resort after the League's efforts to remedy a given situation proved ineffective.¹⁰⁶ The League system did not prohibit war or the use of force, but it did set up a procedure designed to restrict them to tolerable levels.¹⁰⁷

Even with the League of Nations' accomplishments, until 1945 there was no treaty or customary international law prohibiting the unilateral use of force.¹⁰⁸ States reserved the right to use force.¹⁰⁹ As a consequence, the principles that emerged from the Nuremberg trials after World War II were considered as a momentous advance toward an effective rule of law in international society.¹¹⁰

These Nuremberg principles were first expressed in the London agreement of 1945, by which the United States, the Soviet Union, Great Britain, and France established the International Military Tribunal to try the leaders of Nazi Germany for their role in planning and waging the war.¹¹¹ The principles affirmed that aggressive war is illegal and that persons responsible for such wars are guilty of an international crime.¹¹² The Military Tribunal cited, *inter alia*, the Kellogg-Briand Pact of 1928 and a resolution of the League of Nations to support a conclusion

⁹⁹ Fidler, *supra* note 98 citing Hoffmann, *supra* note 98, at n. 63.

¹⁰⁰ Schmitt, *supra* note 97, at 94.

¹⁰¹ W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 A.J.I.L. 642 (1984).

¹⁰² *Id.*

¹⁰³ Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 Loy. L.A. Int'l & Comp. L.J. 365, 370 (1995).

¹⁰⁴ Reisman, *supra* note 101, at 642.

¹⁰⁵ Roch, *supra* note 95; Krylov, *supra* note 103, at 370.

¹⁰⁶ *Id.*

¹⁰⁷ Shaw, *supra* note 30, at 780; Krylov, *supra* note 103, at 370.

¹⁰⁸ Reisman, *supra* note 101, at 642; Krylov, *supra* note 103, at 370-1.

¹⁰⁹ *Id.*

¹¹⁰ Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. Chi. L. Rev. 113 (1986).

¹¹¹ *Id.*

¹¹² *Id.*

that wars of aggression were illegal under customary international law.¹¹³ Although the Kellogg-Briand Pact was the first prohibition against the use of force in modern history, it made wars of aggression illegal but did not specifically prohibit other uses of force (i.e., to safeguard citizens abroad or for humanitarian purposes).¹¹⁴

B. U.N. Charter to the Present

The U.N. Charter, signed in June 1945, introduced a radically new notion, a general prohibition of the unilateral resort to force by states.¹¹⁵ Through Article 2(4), the U.N. Charter became the first instrument to prohibit all uses of unilateral force.¹¹⁶ Uses of force that were previously legal (i.e., to avenge past injustices or to vindicate legal rights) became illegal under Article 2(4).¹¹⁷

Article 2(4) of the U.N. Charter is but one part of a complex collective security established by the Charter.¹¹⁸ Chapter VI of the Charter established procedures for the peaceful settlement of disputes¹¹⁹ and Chapter VII granted the UNSC broad authority to respond to threats to the peace, breaches of the peace, and acts of aggression.¹²⁰ Chapter VII explicitly grants the Security Council the right to use force to maintain peace.¹²¹ Although Article 2(4) considerably limits the legal use of force, the Charter explicitly recognizes, through the Article 42 authorization of use of force by the UNSC, the need for the use of force to maintain international peace.¹²²

Article 2(4) is now recognized as being identical to customary international law on the use of force which itself is recognized as *jus cogens*.¹²³ Article 2(4) in conjunction with Articles 42 and 51 are commonly interpreted to prohibit all uses of force except in self-defense (Article 51) or pursuant to UNSC authorization (Article 42).

During the cold war, the UNSC was ineffective because of disagreements among its permanent members.¹²⁴ There is no question that this failure of the permanent members to cooperate prevented the UNSC from performing some of its major responsibilities.¹²⁵ Between

¹¹³ *Id.*

¹¹⁴ Krylov, *supra* note 103, at 371.

¹¹⁵ Schachter, *supra* note 110, at 113; Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 Alb. L. Rev. 571, 572 (1997).

¹¹⁶ Roch, *supra* note 95.

¹¹⁷ Schachter, *supra* note 110, at 120; Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1633-4 (1984); Schmitt, *supra* note 97, at 95.

¹¹⁸ Reisman, *supra* note 101, at 642.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ U.N. Charter Article 42.

¹²² Reisman, *supra* note 101, at 642.

¹²³ Schachter, *supra* note 110, at 129-130.

¹²⁴ Leland M. Goodrich, "The U.N. Security Council" in *The United Nations - Past, Present, and Future*, J. Barros, ed., 27 (1972); J.D. Godwin, *NATO's Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 Mil. L. Rev. 1, 4-5 (1999); Wedgwood, *supra* note 8, at 834.)

¹²⁵ Goodrich, *supra* note 124, at 27-8; Glenn T. Ware, *The Emerging*

1945 and 1990 there were 279 vetoes in the UNSC on matters involving international security.¹²⁶ Today, scholars disagree on whether the post-cold war UNSC has effectively performed its responsibilities.¹²⁷

V. U.N. CHARTER: RELEVANT PROVISIONS

The U.N. Charter is the starting point in the search for a legal justification for the use of force by the NATO members in the FRY because all NATO members and the FRY are parties, its provisions on the use of force are recognized as being identical to customary international law on the use of force, and its provisions on the use of force are recognized as *jus cogens*. In addition to its provisions on the use of force, the Charter addresses sovereignty, the related principle of non-interference in the domestic affairs of a sovereign state, and human rights.¹²⁸

A. Preamble

"[T]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest . . ."

The preamble identifies two key principles underlying the Charter, the maintenance of peace (through the prevention of armed conflict) and the promotion of human rights. When the Charter was drafted after the atrocities of World War II, human rights were considered important and deserving of protection.¹²⁹ Articles 55 and 56 reaffirm the U.N. commitment to human rights.¹³⁰ However, the Charter does not specify any method for achieving its human rights objectives.¹³¹

According to Article 31 of the Vienna Convention on the Law of Treaties, the preamble is an element of the context of the treaty for purposes of interpreting treaty provisions but it does not create legal obligations.

Norm of Humanitarian Intervention and Presidential Decision Directive 25, 44 Naval L. Rev. 1, 11, (1997).

¹²⁶ Ware, *supra* note 125, at 11.

¹²⁷ Yes: Jules Lobel and Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 A.J.I.L. 124, 134 1999; Ware, *supra* note 125, at 11. No: Godwin, *supra* note 124, at 5, 1999 (see n. 80 at 19 for a list of recent vetoes); Krylov, *supra* note 103, at 397.

¹²⁸ For detailed annotations of the U.N. Charter, see *The Charter of the United Nations: A Commentary*, Bruno Simma ed., Oxford Univ. Press.

¹²⁹ Frederick Petersen, *Note: The Facade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations*, 15 Ariz. J. Int'l & Comp. Law 871, Lexis LAWREV, ALLREV file (1998).

¹³⁰ *Id.*

¹³¹ *Id.*

B. Article 1

The Purposes of the United Nations are:

"(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

"(3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;"

The protection of human rights is among the primary purposes of the Charter. However it is subsidiary to the objective of limiting war and the use of force in international relations.¹³² The dichotomy between prohibiting the use of force and protecting human rights underlies the debate over whether the Charter permits the use of force for humanitarian intervention.

C. Article 2(1)

"The Organization is based on the principle of the sovereign equality of all its Members"

The meaning of "sovereignty" has varied throughout history.¹³³ It often became an attribute of a powerful individual whose authority over territory came from divine or historic authority, but not from the consent of the people.¹³⁴ As the international legal system developed in Europe, monarchs placed a broad category of issues above the law by invoking the doctrine of sovereignty.¹³⁵ Thus originated the concept of excluding intervention into issues that are in the sovereign's exclusive "domestic jurisdiction."¹³⁶

The American Revolution and the French Revolution changed the concept of sovereignty from divine or historical authority to the concept that governmental authority is based on the consent of the people.¹³⁷ The sovereignty of the sovereign became the sovereignty of the people thus creating "popular sovereignty."¹³⁸

With its strong support for sovereignty, including the corollary of non-intervention into the domestic affairs of a sovereign state¹³⁹ and its support for human rights, the Charter supports those who oppose humanitarian intervention (i.e., it violates sovereignty) and those who favor it (i.e., it is necessary to protect human rights).¹⁴⁰

¹³² Charney, *supra* note 13, at 1234 (arguing against a right to use force for humanitarian intervention).

¹³³ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 A.J.I.L. 866 (1990).

¹³⁴ *Id.*

¹³⁵ *Id.* at 867.

¹³⁶ *Id.*

¹³⁷ *Id.* at 867.

¹³⁸ *Id.*

¹³⁹ see *infra* discussion of Article 2(7).

¹⁴⁰ For a discussion of the theoretical clash between sovereignty and human rights, see Petersen, *supra* note 129. See also Ravi Mahalingam, *Comment: The Compatibility of the Principle of Nonintervention With the Right of Humanitarian Intervention*, 1

D. Article 2(4)

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

According to the prevailing view, including the ICJ, Article 2(4) is identical to customary international law¹⁴¹ and its prohibition on the use or threat of force is a peremptory rule of international law (*jus cogens*).¹⁴² Some international lawyers believe that Article 2(4) is a codification of the customary law on the use or threat of force that developed prior to World War II and existed at the time the Charter was written.¹⁴³ The other possibility is that customary international law evolved to be identical to the U.N. Charter because of the large number of states that became parties to the Charter.

Only two exceptions to the Article 2(4) prohibition of the threat of or use of force are expressly allowed by the Charter: force used in self-defense when an armed attack occurs (Article 51), and armed action authorized by the UNSC as an enforcement measure (Article 42). Most observers considered Article 2(4) and its two exceptions the most important principles of contemporary international law, a view that has been reaffirmed repeatedly.¹⁴⁴

E. Article 2(7)

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Article 2(7) does not confer additional powers on the UNSC, it only grants exceptions to the non-intervention principle with regard to measures taken under Chapter VII.¹⁴⁵ The concluding phrase "but this principle shall not prejudice the application of enforcement measures under Chapter VII" allows the UNSC to take measures to maintain or restore international peace and security even if such measures intervene in matters that are within the domestic jurisdiction of a state. The UNSC's authority has been considered to derive from the voluntary

UCLA J. Int'l & For. Aff. 221, 244 et. seq. (1996). For a discussion of the history of sovereignty, see Benedict Kingsbury, *Sovereignty and Inequality*, www.ejil.org/journal/Vol9/No4/art1.html.

¹⁴¹ Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, Eur. J. Int'l L., www.ejil.org/journal/Vol2/No2/art6.html.

¹⁴² Fidler, *supra* note 98, at n. 8 (citing the *Nicaragua v. U.S.* ICJ case and other scholars); Schachter, *supra* note 110, at 126, 129 (Article 2(4) is *jus cogens*).

¹⁴³ Fidler, *supra* note 98.

¹⁴⁴ Schachter, *International Law: The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620 (1984).

¹⁴⁵ Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 Ind. L.J. 887, 898 (1992).

relinquishment of absolute sovereignty by the U.N. members as a consequence of membership, and it is a source of constant tension between the U.N. and the members over the amount of sovereignty relinquished.¹⁴⁶

The principle of non-intervention in the domestic matters of a sovereign state is deeply enshrined in general international law.¹⁴⁷ It is one of the foundation principles on which the rest of international law depends.¹⁴⁸ Under Article 15(8) of the Covenant of the League of Nations, if the Council found a dispute between any two parties "to arise out of a matter which by international law is solely within the domestic jurisdiction of that party," the Council would refrain from making any recommendation as to its settlement.¹⁴⁹

The question of the extent and content of domestic jurisdiction is a matter for international law.¹⁵⁰ A matter is exclusively within a state's domestic jurisdiction only when it is not a matter of international law.¹⁵¹ Domestic jurisdiction is a residual concept; it is simply another way of saying that international law does not apply.¹⁵²

Although the principles of sovereignty and the equality of states under law prohibit interventions by other states or organizations, the scope of this prohibition is still controversial.¹⁵³ It has been subject to a process of re-interpretation in the human rights field so that states may no longer use this principle to exclude international concern and consideration of internal human rights situations.¹⁵⁴

F. Article 25

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

This provision makes U.N. members' compliance with UNSC resolutions a legal obligation. A member's failure to comply with UNSC resolutions, as the FRY did, is a violation of that member's U.N. Charter obligations under international law.

G. Article 27(3)

"Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

The phrase "all other matters" refers to matters other than "procedural matters" which are covered in Article 27(2). Decisions on procedural matters are made by affirmative vote of nine UNSC members regardless of whether the permanent members concur. Whether an issue is

¹⁴⁶ Michael Reppas, *Note and Comment: The Lawfulness of Humanitarian Intervention*, 9 St. Thomas L. Rev. 463, 470 (1997).

¹⁴⁷ Delbruck, *supra*, note 145 at 889. See *supra* the discussion of Article 2(1).

¹⁴⁸ *Id.*; Shaw, *supra* note 30, at 202.

¹⁴⁹ Reisman, *supra* note 133, at 867.

¹⁵⁰ Shaw, *supra* note 30, at 202 n. 34.

¹⁵¹ D'Amato, *supra* note 62, at 1125 n. 62 (citing Henkin).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Shaw, *supra* note 30, at 202.

procedural or non-procedural is treated as a non-procedural question and is thereby governed by Article 27(3).¹⁵⁵

For non-procedural matters, the need for the "concurring votes of the permanent members" before a decision can be taken gives each permanent member a veto. A fair reading of this requirement would prevent a decision if any permanent member opposes, abstains, or is absent during the voting. However, the U.N.'s consistent practice has been to permit passage of a resolution when permanent members abstain or are absent.¹⁵⁶ For example, when North Korea attacked South Korea in 1950, the UNSC was able to act under Chapter VII because the Soviet representative was absent.¹⁵⁷ The UNSC became unable to act when the Soviet representative returned.¹⁵⁸

H. Article 34

"The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."

Note that the phrase "any situation that might lead to international friction or give rise to a dispute" includes domestic situations. Article 2(7) prohibits "intervention" not "investigation."

I. Article 39

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

This article is the sole explicit basis for enforcement actions to be taken by or authorized by the UNSC.¹⁵⁹ Articles 41 and 42 describe the non-forcible and forcible, respectively, measures the UNSC may take.

J. Article 41

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Articles 41 and 42 authorize the UNSC to take measures not involving the use of force, and with the use of force, respectively, to maintain or restore international peace and security.

¹⁵⁵ Goodrich, *supra* note 124, at 24.

¹⁵⁶ Lobel and Ratner, *supra* note 127, at 137.

¹⁵⁷ Goodrich, *supra* note 124, at 42.

¹⁵⁸ *Id.*

¹⁵⁹ Delbruck, *supra* note 145, at 898.

K. Article 42

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Article 42 is the only Charter article that expressly allows the U.N. to use force.¹⁶⁰ The phrase "would be inadequate" allows the UNSC to take measures under Article 42 without first taking measures under Article 41.¹⁶¹

L. Article 48(1)

"The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine."

This is a key article in Chapter VII because it implements the enforcement measures imposed by the UNSC and allows the UNSC to impose a duty to act on some or all U.N. members.¹⁶² It is more specific than Article 25 (which states the general requirement for members to implement UNSC decisions) because it grants the UNSC authority to determine which members shall implement such decisions.¹⁶³

M. Article 48(2)

"Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

This Article provides authority for U.N. members to implement UNSC decisions through other organizations such as NATO.

N. Article 51

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

¹⁶⁰ Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 A.J.I.L. 452, 462 (1991).

¹⁶¹ *Id.* See Lobel and Ratner, *supra* note 127, at 134 n. 39 (for a list of recent UNSC authorizations for the use of force).

¹⁶² Schachter, *supra* note 160, at 463.

¹⁶³ *Id.*

Article 51 creates a "self-defense" exception to Article 2(4)'s overall prohibition on the use of force. Originally the customary law right of self-defense was not limited to situations of ongoing aggression; it allowed the use of force to recover things wrongfully seized and to preempt an imminent armed attack (anticipatory self-defense).¹⁶⁴ The issue of whether Article 51 has become customary law such that it prohibits recovery of wrongfully seized items and prohibits anticipatory self-defense is unresolved.¹⁶⁵

The requirement that an "armed attack" occur prior to the use of force in self-defense has been broadly construed. The U.S. bombing of Libya after terrorist acts in Europe, and U.S. intervention in Nicaragua were justified as self-defense.¹⁶⁶ Israel claimed that its June 1981 attack on an Iraqi nuclear reactor was anticipatory self-defense.¹⁶⁷ The U.S. justified the August 1998 cruise missile attacks against Afghanistan and a Sudanese pharmaceutical plant as self-defense against planned terrorist attacks.¹⁶⁸

O. Article 52(1)

"Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

Regional arrangements under Article 52 may use non-forcible means without UNSC authorization but may not use force (other than in self-defense) without prior authorization from the UNSC.¹⁶⁹

NATO officials so far have been reluctant to consider NATO as a regional organization under the U.N. Charter out of a concern that such a categorization would imply additional obligations in the U.N. context.¹⁷⁰

P. Article 53(1)

"The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council..."

Article 53(1) allows the UNSC to delegate authority for implementation of UNSC decisions to regional organizations. Regional peace-keeping operations that have the consent of the states subject to the peace-keeping operations and that do not use force (other than in self-

¹⁶⁴ Schmitt, *supra* note 97, at 95; Schachter, *supra* note 144 at 1633-4.

¹⁶⁵ Schachter, *supra* note 144 at 1633-4.

¹⁶⁶ *Right V. Might: International Law and the Use of Force*, 46, 54, Henkin et. al. eds. (1989).

¹⁶⁷ Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 A.J.I.L 584, 587 (1983).

¹⁶⁸ Murphy, *supra* note 8, at 161.

¹⁶⁹ Schachter, *supra* note 144, at 1641. See Godwin, *supra* note 127, at 31 et. seq. (for a discussion of Article 52 and the authority of regional organizations).

¹⁷⁰ Bring, *supra* note 5.

defense) do not need UNSC authorization.¹⁷¹ UNSC authorization is required for "enforcement" actions which use force.¹⁷²

Q. Article 54

"The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security."

One reason NATO is not a regional arrangement within the meaning of Article 52 is because NATO does not inform the UNSC of its activities pursuant to Article 54.¹⁷³

R. Article 55(c)

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 55(c) recognizes that protection of human rights is a necessary condition for peaceful and friendly relations and requires that the U.N. promote respect for and observance of human rights.

S. Article 103

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Article 103 is a type of supremacy clause for resolving conflicts of legal obligations between different treaties for which an individual U.N. member is a party. Each U.N. member agrees that should they intentionally or inadvertently incur a treaty obligation that conflicts with the member's U.N. Charter obligations, that member will fulfill its obligations under the U.N. Charter even if doing so would place the member in breach of its obligations under another treaty. Article 103 has no effect on conflicting obligations between the U.N. Charter and new customary international law. If customary law evolves to be in conflict with the Charter, the customary law would prevail.

VI. HUMANITARIAN INTERVENTION IN GENERAL

A. Definition and Concepts

Humanitarian intervention has been defined by one author as unilateral intervention by armed force to protect the inhabitants of another state from inhuman treatment.¹⁷⁴ Another

¹⁷¹ Shaw, *supra* note 30, at 882.

¹⁷² Schachter, *supra* note 144 at 1640.

¹⁷³ *Id.*

¹⁷⁴ Malanczuk, *supra* note 141. See also Michael Burton, Note: *Legalizing the sublegal: A Proposal for Codifying a Doctrine of*

author defines it as the threat or use of force by a state, group of states, or international organization for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.¹⁷⁵ The controversial element of humanitarian intervention is the "unilateral" use of force. In this context, "unilateral" refers to the absence of either of the accepted justifications for the use of force, self-defense or UNSC authorization. The use of force may be by a single state, multiple states, or an international organization.

The principle of humanitarian intervention is based on a choice between state sovereignty (i.e., non-intervention into domestic affairs) and the protection of human rights.¹⁷⁶ The law of non-intervention is applicable when the acts inducing the humanitarian intervention have occurred totally within a state's borders.¹⁷⁷ Often the state has committed no acts outside of its borders.¹⁷⁸

B. The Law of Non-Intervention

The law of non-intervention is a corollary to the right of sovereignty and it requires that states refrain from interfering in the domestic affairs of other states.¹⁷⁹ This law arose principally from numerous global and regional treaties,¹⁸⁰ and its status as customary international law is supported by a succession of U.N. resolutions.¹⁸¹ Non-intervention is the foundation of state sovereignty, and sovereignty is the attribute that makes a nation an equal member in the international community.¹⁸²

Although the ICJ and generations of international legal scholarship have confirmed the importance of the customary law of non-intervention,¹⁸³ the ICJ has stated that the law of non-intervention would allow new exceptions where states, through their actions in reliance on a novel right or an unprecedented exception, establish a new practice with the support of other

Unilateral Humanitarian Intervention, 85 Geo. L.J. 417 (1996) (for a definition of unilateral humanitarian intervention).

¹⁷⁵ Rein Mullerson, *Book Review and Note: Humanitarian Intervention: The United Nations in an Evolving World Order*, 92 A.J.I.L. 583 (1998) (quoting Sean D. Murphy). Humanitarian intervention without the use of force (i.e., using economic, political or diplomatic means) is legal. See Charney, *supra* note 13, at 1231.

¹⁷⁶ Chinkin, *supra* note 10, at 845; Mahalingam, *supra* note 140, at 223.

¹⁷⁷ *Id.*

¹⁷⁸ The Kosovo air campaign was intended to counter atrocities committed by the FRY government against FRY citizens in the FRY province of Kosovo.

¹⁷⁹ Mahalingam, *supra* note 140, at 221. See *supra* discussion of Articles 2(1) and 2(7).

¹⁸⁰ Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 Mich. J. Int'l L. 1005, 1009 n. 5 and accompanying text.

¹⁸¹ *Id.* at 1008, 1009 n. 6.

¹⁸² *Id.* at 1009.

¹⁸³ *Id.* at 1008-9 n. 7 and accompanying text.

states.¹⁸⁴ In 1986 the ICJ determined that no right of humanitarian intervention existed because states had not justified their conduct by referring to a new right of intervention or a new exception to the law of non-intervention (they had not expressed the necessary *opinio juris*), and not because the creation of such a right was impossible as a matter of law.¹⁸⁵

During the cold war, fear of a superpower confrontation prevented the international community from enforcing human rights standards.¹⁸⁶ Human rights abuses were subordinate to superpower interests and were considered internal domestic issues.¹⁸⁷ The Helsinki Accords have been interpreted as the Soviet Union's acknowledgment that human rights are an international issue and the Accords have been considered a departure from the principle of non-intervention.¹⁸⁸ After the cold war ended, support increased for a right to intervene in the domestic affairs of a state when the norms of civilized behavior have been egregiously violated.¹⁸⁹ While it is difficult to define the parameters of the emerging norm of intervention, there is little doubt as to its existence, especially when justified by the U.N. on a multilateral basis.¹⁹⁰ It should be noted that a determination that human rights abuse permits international intervention does not permit the use of force for such intervention. The legal requirements for the use of force must also be met. Authority to use force could come from a UNSC resolution, self-defense pursuant to Article 51, or through customary international law.

C. The History of Customary Law on Humanitarian Intervention

The validity of humanitarian intervention is based on "a long tradition of natural law and secular values: minimum reciprocal responsibilities of all humanity, the inability of geographical boundaries to stem categorical moral imperatives, and the confirmation of the sanctity of human life, without reference to place or transient circumstance."¹⁹¹ A customary international law right of humanitarian intervention was recognized by the respected legal scholar Grotius in 1625 when he stated that a "war for the subjects of another [is] just, for the purpose of defending them from injuries inflicted by their ruler . . ."¹⁹² In 1758 another eminent international law scholar, Emmerich de Vattel supported Grotius.¹⁹³ The principle that inhumane atrocities against civilian populations are so contrary to the law of nations that a country is rightfully entitled to interfere to end them by force was repeatedly claimed and often acted upon during the nineteenth century.¹⁹⁴

¹⁸⁴ *Id.* at 1013.

¹⁸⁵ *Id.* 1013 (citing the ICJ).

¹⁸⁶ Ware, *supra* note 125, at 7 n. 14.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 7-8.

¹⁹⁰ *Id.* at 11.

¹⁹¹ Burmester, *supra*, note 98 at 273 n. 20 citing Michael Reisman & Myres S. McDougal, "Humanitarian Intervention to Protect the Ibos," in *Humanitarian Intervention and the United Nations*, 167, 168 (Richard B. Lillich ed., 1973).

¹⁹² Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnat'l L. 787, 848 n. 290 (1999) (quoting Halberstam); Burmester, *supra* note 98, at 272; Krylov, *supra* note 103, at 368.

¹⁹³ Krylov, *supra* note 103, at 368.

¹⁹⁴ Van Schaack, *supra* note 192, at 849 n. 294; Richard Lillich, *Kant and the Current Debate Over Humanitarian Intervention*, 6 J.

Despite a long history of support, the principle of humanitarian intervention remained controversial, and before World War II there was a substantial divergence of opinion among the most prominent international lawyers.¹⁹⁵ This divergence of opinion continues as lawyers disagree whether the U.N. Charter: (1) neither terminated nor weakened the customary law of humanitarian intervention¹⁹⁶ or (2) made the continued validity of unilateral humanitarian intervention problematic, if not illegal (primarily because of Articles 2(4) and 2(7)).¹⁹⁷ State practice before and after the U.N. Charter includes examples of intervention to protect human rights, both with and without the use of force.¹⁹⁸

In the 1970s, the International Law Association attempted to draft a Protocol on Procedure for Humanitarian Intervention but its efforts failed on the question of whether, if a veto in the UNSC blocked U.N. action, unilateral humanitarian intervention was permissible.¹⁹⁹

D. Recent Practice Concerning Humanitarian Intervention

The international community is increasingly intervening, through international organizations, in internal conflicts where human rights are in serious jeopardy.²⁰⁰ However, humanitarian issues have never been the only reasons invoked for military intervention.²⁰¹ Few, if any, interventions can be found in which the intervening states have expressly based their actions on the right of humanitarian intervention.²⁰² Without *opinio juris* by the intervening

Transnat'l L. & Pol'y 397 (1997).

¹⁹⁵ Krylov, *supra* note 103, at 371 (citing Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 Cal. W. Int'l L.J. 203, 223 (1974)).

¹⁹⁶ Krylov, *supra* note 103, at 382; Felix Lopez, *The Lawfulness of Humanitarian Intervention*, 2 USAFA J. Leg. Stud. 97, 103 (1991) (citing McDougal & Reisman, *Response by Professors McDougal and Reisman*, 3 Int'l Law, 438 (1969), with McDougal and Reisman stating that the customary law of humanitarian intervention has not only survived but has been bolstered by the adoption of the U.N. Charter); Lillich, *supra* note 194, at 397.

¹⁹⁷ Lillich, *supra* note 194, at 399; Burmester, *supra* note 98, at 273; Lopez, *supra* note 196, at 104 n. 69 (citing I. Brownlie, *International Law and the Use of Force By States* 340 (1963)).

¹⁹⁸ Lopez, *supra* note 196, at 104 (listing examples from 1938 to recent years).

¹⁹⁹ Lillich, *supra* note 194, at 399. Today, support for a right of humanitarian intervention is consistent with contemporary international law which views at least a minimum core of basic human rights to be rights *erga omnes*, rights of international concern which are so important that any state has standing to protect their violations by another state. Lillich, *supra* note 194, at 397.

²⁰⁰ Cassese, *supra* note 23, (listing examples from the 1990s). See also Lopez, *supra* note 196, at 104 (listing examples of humanitarian interventions from 1938 to recent years).

²⁰¹ Malanczuk, *supra* note 141; Petersen, *supra* note 129; Burton, *supra* note 174, at 428.

²⁰² Charney, *supra* note 13, at 1238.

states, practice alone does not satisfy customary law requirements for the establishment of new law.²⁰³ In order to form new customary law for a humanitarian intervention exception to the prohibition on the use of force, the states who intervene must justify their conduct as humanitarian intervention.

Most recent situations in which the theory of humanitarian intervention could be claimed applicable involve actions by states to protect their citizens in another state when that host state is either unable or unwilling to protect them from mortal danger.²⁰⁴ Examples include actions in the Congo, the Dominican Republic, Entebbe, Grenada, and Panama.²⁰⁵ Such operations are usually justified as a form of self-defense under Article 52.²⁰⁶

E. Arguments Against a Right of Humanitarian Intervention

According to widespread opinion, the general prohibition against the use of force under international law does not allow unilateral interventions using force by states even to rescue their citizens or citizens of third states, from threats to their lives and physical safety in a state that is either unwilling or unable to protect them.²⁰⁷ Humanitarian interventions were once accepted as legal but are widely viewed as illegal today.²⁰⁸ This is because permitting the use of force based on the "isolated" decisions of individual states would erode the general prohibition against the use of force.²⁰⁹

Prominent international law scholar Louis Henkin opposes recognition of a unilateral right of humanitarian intervention but Henkin acknowledges the existence of an "Entebbe" exception to the Article 2(4) prohibition on the use of force that would allow a state to enter the territory of another state for the sole, temporary purpose of liberating hostages, even if the hostages are not its own nationals.²¹⁰ Henkin notes that the Charter's original intent was to prohibit the use of force, even force used to promote human rights, and that prohibition remains intact.²¹¹ Another prominent jurist, Oscar Schachter, agrees that the Charter prohibits humanitarian intervention: "Neither human rights, democracy or self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional just war causes or righting wrongs."²¹² Henkin acknowledges that human rights violations are ubiquitous, and some are egregious, but "the use of force remains itself a most serious - the most serious violation of human rights. It should not be justified by any claim that it is necessary to safeguard other human rights. Surely the law cannot warrant any state's intervening by force against the

²⁰³ *Id.*

²⁰⁴ *Id.* at 1235.

²⁰⁵ *Id.*

²⁰⁶ See Schachter, *supra* note 94 at 139.

²⁰⁷ Delbruck, *supra* note 145, at 889.

²⁰⁸ *Id.* See Schmitt, *supra* note 97, at 95 n. 10 (for support of a old customary law creating a duty to intervene on behalf of innocent people who were subjected to mistreatment by their rulers).

²⁰⁹ Delbruck, *supra* note 145, at 891 n. 11 (citing Oppenheim).

²¹⁰ Henkin, *supra* note 115, at 573; Kritsiotis, *supra* note 180, at 1015 n. 29.

²¹¹ Henkin, *supra* note 166 at 41.

²¹² Cassese, *supra* note 23, at n. 2 (citing Oscar Schachter, *International Law in Theory and Practice* 128 (1991)).

political independence and territorial integrity of another on the ground that human rights are being violated, as indeed they are everywhere."²¹³

The prevailing view among international lawyers rejects the legality of humanitarian intervention primarily because of the danger of abuse by more powerful states, which could use it as an excuse to justify the use of force for non-humanitarian reasons.²¹⁴ Therefore, an intervention using force on humanitarian grounds is legal only if the UNSC determines that gross human rights violations committed by a state against its citizens constitute a breach of the peace or threat to the peace within the meaning of Article 39 of the U.N. Charter and the UNSC authorizes the use of force.²¹⁵

In addition to the concern about possible abuse of a right of humanitarian intervention, other traditional arguments against such a right include the propensity for its selective application and the questionable nature of the motives of states which intervene.²¹⁶ These objections continue to be cited because some states continue to use armed force for humanitarian purposes without authorization from the UNSC.²¹⁷ However, they have done so without their condemnation or censure and some interventions have also been given the apparent approval of states.²¹⁸ Another scholar shares this observation and notes that "Nevertheless, it is not inconceivable that in some situations the international community might refrain from adopting a condemnatory stand where large numbers of lives have been saved in circumstances of gross oppression by a state of its citizens due to an outside intervention. This does not, of course mean that it constitutes a legitimate principle of international law."²¹⁹

F. Arguments For a Right of Humanitarian Intervention

Fundamental human rights have been protected by customary international law since before the sixteenth century.²²⁰ Under customary international law, a state in violation of these rights, especially gross violation, could not prevent intervention by claiming that such intervention was prohibited by principles of domestic jurisdiction or sovereignty.²²¹ When a state disregards certain rights of its own citizens, other states are authorized by international law to intervene on grounds of humanity.²²²

The adoption of the U.N. Charter and the Universal Declaration of Human Rights is evidence of the international community's rejection of an absolute right of non-intervention (especially with regards to human rights) and an indication that the moral obligation to support human rights is becoming a legal duty.²²³ In addition, some current state practice could be

²¹³ Henkin, *supra* note 166, at 41.

²¹⁴ Malanczuk, *supra* note 141; Simma, *supra* note 8; Lopez, *supra* note 196, at 104.

²¹⁵ Malanczuk, *supra* note 141.

²¹⁶ Kritsiotis, *supra* note 180, at 1007.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Malanczuk, *supra* note 141, citing Shaw.

²²⁰ Lopez, *supra* note 196, at 103.

²²¹ *Id.*

²²² *Id.* (citing E. Borchard, *The Diplomatic Protection of Citizens Abroad* 14 (1916)).

²²³ Lopez, *supra* note 196, at 104; Godwin, *supra* note 127, at 83; Ware, *supra* note 125, at 7.

invoked to justify an emerging exception to the non-intervention rule.²²⁴

Despite personally opposing any exceptions to Article 2(4) other than the emerging "Entebbe" exception,²²⁵ prominent scholar Louis Henkin has noted that "States have been reluctant to accept [a humanitarian intervention] exception to article 2(4) formally, but the legal community has widely accepted that the Charter does not prohibit humanitarian intervention by use of force strictly limited to what is necessary to save lives."²²⁶ Scholars who support a right of humanitarian intervention consider the use of force to be legal in cases of gross violation of human rights if all peaceful means to protect the victims have been unsuccessful, if the U.N. has failed to help, and if the use of armed force is proportional to the goals of the rescue mission.²²⁷

Another prominent legal scholar, W. Michael Reisman has suggested that contemporary lawyers should avoid automatically denouncing unilateral uses of force by states as violations of Article 2(4).²²⁸ Instead, criteria for appraising the lawfulness of such uses of force must be developed.²²⁹ Reisman also notes that interpretations of Article 2(4) must consider the spirit of the Charter and not simply the letter of a particular provision.²³⁰ The criteria should create a right of humanitarian intervention as a customary law exception to the Article 2(4) prohibition on the use of force.²³¹

As a number of legal scholars have made clear, conditions for any forcible intervention in the absence of UNSC authorization need to be set out in an emerging doctrine on the subject.²³² For example, the following conditions should be met before any humanitarian intervention using force without UNSC authorization begins:

1. it must be a case of gross human rights violations amounting to crimes against humanity;
2. all available peaceful settlement procedures must have been exhausted;
3. the UNSC must be unable or unwilling to stop the crimes against humanity;
4. the government of the state where the atrocities take place must be unable or unwilling to rectify the situation;
5. the decision to take military action could be made by a regional organization covered by Chapter VIII of the U.N. Charter, using the "Uniting for Peace" precedent to seek approval by the General Assembly as soon as possible; or the decision could be taken directly by a two-thirds majority in the General Assembly in accordance with the "Uniting for Peace" procedure;

²²⁴ Kritsiotis, *supra* note 180, at 1020 n. 37 (citing Rodley and the Kurd intervention where China did not object to the military action which was not authorized by the UNSC; but note that the author would require a collapse of the total fabric of the government).

²²⁵ See *supra* Part VI(E).

²²⁶ Henkin, *supra* note 166, at 41. See also Fidler, *supra* note 98, (however n. 122 lists others who find humanitarian intervention to protect nationals, illegal).

²²⁷ Malanczuk, *supra* note 141. When massive human rights violations exist, especially if a genocidal element is present, there exists also the "legal and moral requirements for intervention." Petersen, *supra* note 129, at n. 82 (citing Falk).

²²⁸ Kritsiotis, *supra* note 180, at 1023 n. 48.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² Bring, *supra* note 5.

6. the use of force must be proportional to the humanitarian issue at hand and in accordance with international humanitarian law of armed conflict; and

7. the purpose of the humanitarian intervention must be strictly limited to ending the atrocities and building a new order of security for people in the country in question.²³³ One international lawyer suggests that the criteria for humanitarian intervention should be the same as historically used for a just war because using that criteria will avoid the potential abuses that opponents of humanitarian intervention cite as a reason for no such right.²³⁴

In addressing the Commission on Human Rights in Geneva on 7 April 1999 (during the Kosovo air campaign), U.N. Secretary-General Kofi Annan referred to a "universal sense of outrage" provoked by the repression of Kosovar Albanians by the FRY government.²³⁵ He stated: "Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of sovereignty", and that the U.N. Charter should "never [be] the source of comfort or justification" for "those guilty of gross and shocking violations of human rights."²³⁶

VII. Humanitarian Intervention in Kosovo

A. Arguments Against NATO's Intervention

Most international lawyers agree that NATO's bombing of the FRY was illegal because it was neither based on a UNSC authorization under Chapter VII, nor self-defense under Article 51, the only two justifications for use of force that are currently available under international law.²³⁷ As a result, the intervention risked destabilizing the international rule of law that prohibits a state or group of states from intervening by the use of force in another state, absent authorization by the UNSC or a situation of self-defense.²³⁸ The NATO actions, regardless of how well-intentioned, constitute an unfortunate precedent for states to use force to suppress the commission of international crimes in other states, grounds that easily can be and have been abused to justify intervention for less laudable objectives.²³⁹

The Kosovo situation justifies a double condemnation: sovereignty does not justify genocidal acts but genocide cannot be countered by unauthorized uses of force delivered in an excessive and inappropriate manner.²⁴⁰ Although, admittedly, no jurisprudential approach to legal analysis leaves an entirely satisfied impression under the circumstances that existed in

²³³ Bring, *supra* note 5; Roch, *supra* note 95, at n. 155 (citing Nanda); Cassese, *supra* note 23.

²³⁴ Schmitt, *supra* note 97, at 95.

²³⁵ Bring, *supra* note 5.

²³⁶ *Id.*

²³⁷ Bring, *supra* note 5; Rajinikant Jadhav, *Comment: U.N. and the Use of Force - Balancing the New Rules*, Eur. J. Int'l L., www.ejil.org/forum/messages/50.html (1999); Charney, *supra* note 13, at 1232; Falk, *supra* note 10, at 848; Franck, *supra* note 23, at 858; Simma, *supra* note 8; W. Michael Reisman, *Editorial comments: NATO's Kosovo Intervention: Kosovo's Antinomies*, 93 A.J.I.L. 860 (1999); Chinkin, *supra* note 10, at 842.

²³⁸ Charney, *supra* note 13, at 1232.

²³⁹ *Id.*

²⁴⁰ Falk, *supra* note 10, at 848.

Kosovo.²⁴¹ The textual level of U.N. Charter analysis cannot give a satisfactory basis for NATO intervention nor can it provide a suitable rationale for rejecting the humanitarian imperative to rescue the potential victims of genocidal policies in Kosovo.²⁴²

Despite the moral justification supporting NATO's actions, to legitimize illegal use of overwhelming force by a group of states essentially because the U.N.'s collective security system is unable to stop it is to support legalized vigilantism.²⁴³ From the view point of international law this is a giant step backward to the pre-World War II and pre-U.N. era.²⁴⁴ The Kosovo crisis may have exposed both the U.N. Charter's inability to effectively resolve human rights issues affecting innocent populations and the penchant of the world's "democracies" to "promote" the "rule of law" in the most undemocratic manner, by the illegal use of force.²⁴⁵

The principle of humanitarian intervention is not well defined and the evidence does not establish a rule of law permitting the use of force against a state in situations like that of Kosovo.²⁴⁶ Unfortunately, humanitarian intervention is not an exception to the Charter prohibitions on the use of force.²⁴⁷ No reference to such a right is found in the Charter.²⁴⁸ A veto in the UNSC does not mean that the UNSC is ineffective and thus may be circumvented.²⁴⁹ The veto's function is to prevent use of force without consensus of the permanent members.²⁵⁰ Had NATO been as flexible with Belgrade before the air campaign as it was after, the use of force may not have been necessary, or, if still necessary, NATO's use of force without UNSC authorization would have seemed far more reasonable.²⁵¹ In Kosovo, it was justifiable to act but not in the manner undertaken.²⁵²

B. Arguments For NATO's Intervention

Despite the U.N. Charter's limitations on the use of force, humanitarian intervention arguably provides a lawful foundation for the NATO actions.²⁵³ In particular, it would appear that Articles 1(3) and 55(c) taken alone outweigh the issue of sovereignty with respect to the FRY as any actions contrary to Article 1(3) by any state would undermine the very purpose of the United Nations and would violate Article 2(4) itself.²⁵⁴

Many of the international lawyers who agree that neither of the U.N. Charter's two permissible uses of force (self-defense and UNSC authorization) applies to the Kosovo air campaign, would also agree that there is a trend in today's international community towards a

²⁴¹ *Id.* at 852.

²⁴² *Id.* at 853.

²⁴³ Jadhav, *supra* note 237.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Charney, *supra* note 13, at 1235 n. 17 (citing authors supporting and opposing the position).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Falk, *supra* note 10, at 850.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 851.

²⁵² *Id.* at 854.

²⁵³ Charney, *supra* note 13, at 1235.

²⁵⁴ Roch, *supra* note 95.

better balance between the security of states and the security of people.²⁵⁵ Given that one of the U.N.'s basic purposes is guaranteeing fundamental human rights, the argument that "something should be done" is particularly compelling.²⁵⁶ Thus it should be easy to agree that a rule of law is definitely required to prevent massive violations of human rights, if necessary by the use of force.²⁵⁷ Although NATO's means may have been technically illegal, in the end its actions protected human rights and reinforced humanitarian law.²⁵⁸ Even an illegal action, if instrumental in bringing about results widely desired by a community, will not seriously undermine a resilient legal system, one with the elasticity to make allowances for mitigating circumstances.²⁵⁹

The criteria that have been argued as the basis for an emerging legal principle of unilateral humanitarian intervention appeared to have been largely satisfied as regards Kosovo: the use of force was "directed exclusively to averting a humanitarian catastrophe," and the U.N. institutions had failed to respond adequately.²⁶⁰ Also, the military action was not that of a single state, but of a collective defense organization that has worked closely alongside the U.N. in Bosnia, and afterwards.²⁶¹ The UNSC at various times has affirmed the actions of different European organizations with respect to Kosovo: the OSCE, the contact group, the European Union, and NATO.²⁶² The case of Kosovo may have highlighted the continuing chasm between human rights and rhetoric and reality.²⁶³ It does not resolve the way this can be bridged.²⁶⁴

There is no shortage of theories to legitimate the Kosovo campaign.²⁶⁵ The UNSC resolutions provided some measure of legitimacy even without authorization for the use of force.²⁶⁶ In repeated UNSC resolutions the Kosovo conflict was defined as an international crisis and a threat to regional peace and security rather than simply an internal matter.²⁶⁷ The UNSC endorsement of "an international armed presence" in Kosovo after the conflict, with the forced withdrawal of FRY troops, is also of some significance, for it is implausible that the UNSC would ratify the results of military campaign if it considered the means wholly illicit or tantamount to aggression.²⁶⁸

On the third day of the air campaign, the UNSC refused a request to condemn NATO's military action.²⁶⁹ Belarus, India, and Russia offered a draft resolution charging that the NATO bombing violated Articles 2(4), 24, and 53 of the Charter.²⁷⁰ This proposal was defeated by a

²⁵⁵ Bring, *supra* note 5.

²⁵⁶ Jadhav, *supra* note 237.

²⁵⁷ *Id.*

²⁵⁸ Franck, *supra* note 23, at 859.

²⁵⁹ *Id.*

²⁶⁰ Chinkin, *supra* note 10, at 843.

²⁶¹ *Id.*

²⁶² *Id.* (citing UNSC Resolutions 1160 (OSCE, EU, contact group); 1199 (contact group, European Community Monitoring Mission; 1203 (NATO)).

²⁶³ Chinkin, *supra* note 10, at 847.

²⁶⁴ *Id.*

²⁶⁵ Wedgwood, *supra* note 8, at 829.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 830 (noting that UNSC Resolution 1244 authorized the use of force).

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 831.

vote of 12-3.²⁷¹ Such decisions not to act are a part of state practice and *opinio juris* supporting a right of humanitarian intervention.²⁷² In a March 25, 1999 statement referring the Kosovo air campaign, the U.N. Secretary-General noted that "there are times when the use of force may be legitimate in the pursuit of peace."²⁷³

Another principle supporting NATO's actions is the role of regional organizations under the Charter.²⁷⁴ Although Article 53 has sometimes been interpreted as requiring prior UNSC authorization for regional enforcement action, the recent evolution of UNSC practice has been quite different and it provides another form of legitimacy for the NATO action.²⁷⁵ In peacekeeping operations in Africa, the UNSC has deferred its approval of regional action until after the event or has never spoken clearly at all.²⁷⁶ For example, the regional interventions in Liberia and Sierra Leone, led by Nigerian and Ghanaian troops on behalf of the Economic Community of West African States (ECOWAS) were not authorized by the UNSC before the fact, though they were treated with implicit approval afterwards.²⁷⁷ If NATO was a regional organization under the U.N. Charter, the Kosovo action could be described as a precedent for collective humanitarian intervention conducted by a regional organization after a process of collective decision-making.²⁷⁸

Humanitarian interventions involving the threat or use of armed force undertaken without the mandate or the authorization of the UNSC will, as a matter of principle, remain in breach of international law.²⁷⁹ But such a general statement cannot be determinative.²⁸⁰ Rather, in any instance of humanitarian intervention a careful assessment will have to be made of how heavily such illegality weighs against all the circumstances of a particular case, and of the efforts, if any, undertaken by the parties involved to get "as close to the law" as possible.²⁸¹ Such analyses will influence not only the moral but also the legal judgment in such cases.²⁸²

Humanitarian necessity remains the core of NATO's justification for military force in Kosovo.²⁸³ The humanitarian emergency threatened regional stability as refugees flowed over international borders, burdening the delicate political balance in Macedonia and overwhelming the aid capacity of Albania.²⁸⁴ Kosovo demonstrates yet again a compelling need to address the deficiencies in the law and practice of the U.N. Charter.²⁸⁵ The sometimes compelling need for

²⁷¹ *Id.* (no veto was needed because the numerical support was far short of that required for passage).

²⁷² Wedgwood, *supra* note 8, at 830.

²⁷³ *Id.* at 831 n. 17 (citing the Mar 25, 1999 statement by the secretary general, available in the LEXIS Market Library, Iacnws File).

²⁷⁴ *Id.* at 832.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ Bring, *supra* note 5.

²⁷⁹ Simma, *supra* note 8.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Wedgwood, *supra* note 8, at 832.

²⁸⁴ *Id.*

²⁸⁵ Louis Henkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention*, 93 A.J.I.L. 824, 828 (1999).

humanitarian intervention (as at Kosovo), like the compelling need for responding to interstate aggression (as against Iraq over Kuwait), emphasizes again the need for responsible reaction to gross violations of the Charter or to massive violations of human rights, by responsible forces acting in the common interest.²⁸⁶ But neither action by the UNSC under Article 42, nor collective intervention as by NATO at Kosovo, can serve without some modification in the law and the practice of the veto.²⁸⁷

The Kosovo air campaign did not erode Article 2(4).²⁸⁸ Article 2(4) was already changed by the contraction of Article 2(7), which eliminated the "domestic jurisdiction" defense for serious human rights violations thus eliminating a state's right to violate the human rights of its inhabitants.²⁸⁹ The contraction of Article 2(7), which added the right to protect human rights to international law without adjusting the collective security system to provide a means of enforcing that right, created the antinomy of Kosovo.²⁹⁰ "The procedures for deciding and appraising the lawfulness of the Kosovo action were not those contemplated by the Charter."²⁹¹ "That is not good and, no matter how noble and urgent the outcome, it will not be good when it happens in the future."²⁹² "Yet, if the circumstances require, it should -- it must -- be done again!"²⁹³

VIII. THEORIES FOR JUSTIFYING THE USE OF FORCE IN THE KOSOVO AIR CAMPAIGN

Although there is considerable legal opinion that the U.N. Charter expresses the current law on the use of force and that neither of the Charter's bases for the use of force existed for the Kosovo air campaign, scholars, for the most part, tend to agree that NATO's actions were just and there should be a right of humanitarian intervention to protect people from egregious human rights violations committed by their government. Scholars have offered the following theories in support of a right of forcible humanitarian intervention.

A. Article 2(4): Explicit Conditions on Scope

A textual argument for the legality of humanitarian intervention is based on the qualifying clause of U.N. Charter Article 2(4) because a literal reading of that article does not create an absolute prohibition on the use of force.²⁹⁴ The last 24 words of Article 2(4) contain qualifications that require states to refrain from the threat of or use of force only when it is "against the territorial integrity or political independence of any state" or "inconsistent with the purposes of the United Nations."²⁹⁵ If these words are not redundant, they must limit the prohibition against the use of force.²⁹⁶ The textual argument that Article 2(4) permits forcible

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Reisman, *supra* note 237.

²⁸⁹ *Id.* at 861.

²⁹⁰ *Id.* at 862.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Krylov, *supra* note 103, at 372-3; Schachter, *supra* note 144, at 1626.

²⁹⁵ Schachter, *supra* note 144, at 1625.

²⁹⁶ *Id.*; Krylov, *supra* note 103, at 372-3.

humanitarian intervention is that the force used is not directed against the "territorial integrity" or "political independence" of the target state nor is it "inconsistent with U.N. purposes" and thus such use of force is not prohibited by Article 2(4).²⁹⁷ In addition, force used to end human rights abuses conforms with the U.N. Charter's fundamental principles.²⁹⁸

Despite Article 31 of the Vienna Convention on the Law of Treaties which requires that treaty interpretation use the "ordinary meaning" of the terms, there is a debate as to whether the conditional language in Article 2(4) should be interpreted to permit use of force that does not contravene the literal meaning of the clause, or as reinforcing the prohibition on all use of force.²⁹⁹ One scholar argues that neither the U.N. Charter nor the extensive government commentary thereon supports an interpretation of Article 2(4) creating an exception to the basic prohibition against unilateral use of force for other than self-defense or pursuant to a UNSC authorization.³⁰⁰ One reason is that it would deprive 2(4) of much of its intended effect.³⁰¹

This textual argument is the basis for the claim that U.S. interventions in Panama and Grenada did not violate Article 2(4) because the U.S. did not act against the territorial integrity or use force against the political independence of either state.³⁰² After the intervention, the territorial integrity of both states remained intact and both states remained independent nations.³⁰³ Similarly, the Israeli attack of June 7, 1981 on the Iraqi nuclear reactor did not violate Article 2(4) because Iraq's territory and political independence remained intact.³⁰⁴ The Entebbe raid was a humanitarian intervention which did not violate Article 2(4) for the same reasons.³⁰⁵ The fact that no sanctions or penalties were imposed on Israel, supports a claim that the Israeli action was legal.³⁰⁶

The Kosovo air campaign left the FRY political independence and territory intact. The civil and military presence in Kosovo was imposed after the air campaign by UNSC Resolution 1244.³⁰⁷ No sanctions or penalties were imposed on any NATO nation. The UNSC Resolution 1244 requirement that the international security presence in Kosovo contain "substantial NATO participation" could be interpreted as retroactive UNSC approval of the Kosovo air campaign.³⁰⁸

²⁹⁷ Schachter, *supra* note 144, at 1626. See also David M. Kresock, *Ethnic Cleansing in the Balkans: The Legal Foundations of Foreign Intervention*, 27 Cornell Int'l L.J. 203, 214 (1994).

²⁹⁸ Krylov, *supra* note 103, at 372-3.

²⁹⁹ The weight of opinion probably suggests the latter position. Shaw, *supra* note 30, at 784; *Right v. Might: International Law and the Use of Force*, *supra* note 166, at 39-40; Krylov, *supra* note 103, at 372-3.

³⁰⁰ Schachter, *supra* note 94, at 143.

³⁰¹ Schachter, *supra* note 144, at 1626.

³⁰² D'Amato, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Invasion of Panama was a Lawful Response to Tyranny*, 84 A.J.I.L. 516, 520, 523 (1990).

³⁰³ *Id.*

³⁰⁴ D'Amato, *supra* note 167, at 585.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 586 n. 12.

³⁰⁷ See *supra* Part II(D).

³⁰⁸ UNSC Resolution 1244, S/RES/1244(1999), June 10, 1999, Annex 2, paragraph 4.

B. The Failure of the Charter's Collective Security System

The U.N. Charter created a network of institutions and procedures commonly called a collective security system.³⁰⁹ The theory of collective security has two basic elements: first, the unilateral resort to force is legally restricted (by Article 2(4)) and second, a mechanism (the UNSC) is established to provide for the collective use of force by the international community to maintain peace and security. Responsibility for individual state security is transferred to the collective responsibility of the international community.³¹⁰

If the Charter's collective security system had operated according to its terms, it would have obviated the need for unilateral recourse to force.³¹¹ However, the U.N. Charter's mechanisms often proved ineffective.³¹² As mentioned in Part IV(B) *supra*, disagreements among the UNSC's permanent members are the primary reason the UNSC has failed to act. Within five years after the UNSC was created, a practice was established whereby unilateral violations of Article 2(4) might be publicly condemned but privately validated.³¹³ This created a legal gray area between the text of the Charter and the practice of states.³¹⁴ While the general Charter prohibition against unilateral action continued and appropriate organs of the U.N. frequently condemned such action, nothing was done beyond verbal condemnation.³¹⁵ In many cases, the party subject to the condemnation, because of its violation of international law, was permitted to continue to benefit from its illegal action.³¹⁶

It has been argued that the failure of the Charter's collective security system limits the application Article 2(4)'s prohibition on the use of force.³¹⁷ U.S. Ambassador Kirkpatrick argued that Article 2(4) was never intended to stand on its own, but was to be seen in the context of the entire Charter and the collective security system it created.³¹⁸ Professor Reisman agrees that Article 2(4) is not a stand-alone rule against all uses of force but is only one of the two basic elements (the UNSC being the other) in the Charter's collective security system.³¹⁹ And it is in the context of the Charter's collective security system and not as an independent rule of law that Article 2(4) acquired its cogency.³²⁰ When states accepted the collective security structure created by the Charter they relinquished their broader right under customary international law to use force and they did so with the expectation of effective collective peace-keeping measures through state cooperation for the maintenance of world peace.³²¹ A similar view is that the

³⁰⁹ Reisman, *supra* note 101, at 642.

³¹⁰ Fidler, *supra* note 98.

³¹¹ Reisman, *supra* note 101, at 642.

³¹² *Id.* at 643.

³¹³ Fidler, *supra* note 98, at n. 165.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Krylov, *supra* note 103, at 384; Fidler, *supra* note 98.

³¹⁸ Fidler, *supra* note 98, at n. 175.

³¹⁹ Reisman, *supra* note 101, at 642.

³²⁰ *Id.*

³²¹ Krylov, *supra* note 103, at 384; Reisman, *supra* note 101, at 642 n. 175, (argued in the context of Article 51). "But we cannot permit . . . ourselves to feel bound to unilateral compliance with obligations which do in fact exist under the Charter, but are renounced by others. This is not what the rule of law is all about. As we confront the clear and present dangers in the contemporary world, we must recognize that the

failure of the Charter's collective security system vitiates the original intent of construing the prohibition on the use of force (Article 2(4)) broadly while construing the right of self-defense (Article 51) narrowly.³²²

One scholar concludes that states should be fully released from their unilateral commitments to avoid the use of force under Article 2(4) because acceptance of that Article was premised on the effective functioning of a collective security system and the U.N. collective security system has failed (as shown by the continued frequency of unauthorized uses of force).³²³ However, another scholar finds that the legislative history of U.N. Charter Article 2 does not support the argument that effective enforcement of collective security was a prerequisite to renouncing the use of force.³²⁴ Also, no language of the Charter supports the view that the failure of the UNSC to safeguard legal rights should nullify the renunciation force by individual states.³²⁵

A different means for reaching the same result would be to recognize that the UNSC permanent members have such diverse views on the issue of human rights, more diverse than the views they have concerning breaches of the peace and the maintenance of international peace and security, that they are unlikely to agree on humanitarian intervention measures.³²⁶ Therefore, if the UNSC is to be given responsibility for stopping human rights violations, either the UNSC procedures for agreeing on such intervention must be changed (i.e., disallow use of the veto for humanitarian intervention issues) or states must be provided with authority to intervene through some means other than the UNSC.³²⁷

A middle ground would be to recognize that some unilateral uses of force are legitimate, to avoid indiscriminate condemnation of such acts as violations of Article 2(4), and to develop criteria for appraising the lawfulness of unilateral uses of force.³²⁸ Unilateral use of force should not be praised but it is naive and subversive of public order to insist that it never be used because the use of force is an ubiquitous feature of all social life and a characteristic and indispensable component of law.³²⁹ The critical question is not whether force has been used, but whether it has been used in support of or against community order and basic policies, and whether it was used in ways whose net consequences include increased congruence with community goals and minimum order.³³⁰ The key question is whether a particular use of force enhanced or undermined world order.³³¹

UNSC resolutions prior to the air campaign found the situation in Kosovo to be a threat to peace and security in the region and demanded, unsuccessfully, that the violence cease.³³²

belief that the U.N. Charter's principles of individual and collective self-defense require less than reciprocity -- is simply not tenable." Ambassador Kirkpatrick quoted in Fidler, *supra* note 98, at n. 165.

³²² Schmitt, *supra* note 97, at 94.

³²³ Schachter, *supra* 94, at 125 n. 54 (citing Stone).

³²⁴ *Id.* at n. 56.

³²⁵ *Id.* at 128.

³²⁶ Reisman, *supra* note 237, at 861-2.

³²⁷ *Id.*

³²⁸ Reisman, *supra* note 101, at 643.

³²⁹ *Id.* at 645.

³³⁰ *Id.* at 645.

³³¹ *Id.*

³³² See *supra* Part II(B).

However, the UNSC was unable to take any other action to address the threat to peace and security because of a promised Russian veto.³³³ The resounding defeat of a Russian-sponsored resolution to order cessation of the air campaign³³⁴ and UNSC Resolution 1244 following the air campaign³³⁵ support NATO's actions despite the absence of an UNSC authorization to use force. In response to Professor Reisman's "key question" *supra*, UNSC Resolution 1244, the absence of any sanctions, and world opinion in general are strong indications that NATO's use of force enhanced world order.

C. Emerging Customary Law of Humanitarian Intervention and U.N. Charter Re-interpretation

Part III(C) *supra* discussed how customary international law changes and Part III(E) discussed the situation where, as with the law on the use of force, customary law and treaty law are identical but they retain separate existences and can diverge over time. This section provides scholarly opinion on the existence and extent of such a divergence in the law on the use of force as a result of state practice which may constitute evidence of either a re-interpretation of the U.N. Charter or the emergence of new customary law.

Proponents of change contend that recent developments in international relations have significantly altered the conditions on which the restrictive Charter rules were based.³³⁶ It is argued that new interpretations and new rules are required to secure minimal order and justice among states.³³⁷ New laws inferable from the practice of states have already made progress toward undermining Article 2(4) of the Charter.³³⁸ When Article 2(4) was adopted as part of the U.N. Charter in 1945, it had a major impact upon customary law and it incorporated principles from existing customary international law.³³⁹ But Article 2(4) did not "freeze" international law for all time subsequent to 1945.³⁴⁰ Rather, the application of Article 2(4) underwent change and modification almost from the beginning.³⁴¹ Subsequent state practice in humanitarian intervention, anti-terrorist reprisals, individual and collective enforcement measures, and new uses of transboundary force (such as the Israeli raid on the Iraqi nuclear reactor) has altered the meaning and content of the prohibition on the use of force articulated in Article 2(4) in 1945.³⁴² Under the rules of interpretation for treaties (i.e., the U.N. Charter), the subsequent practice of states can modify the meaning of the original treaty provisions and such practice can result in a

³³³ *Id.*

³³⁴ *See supra* Part VII(B).

³³⁵ *See supra* Part II(D).

³³⁶ Schachter, *supra* note 94, at 124-5.

³³⁷ *Id.* at 125.

³³⁸ D'Amato, *Comment: Nicaragua and International Law: The "Academic" and the "Real"*, 79 A.J.I.L. 657, 663 n. 24 (1985) (citing Franck).

³³⁹ D'Amato, *Appraisals of the ICJ's Decision: Nicaragua V. United States (Merits)*, 81 A.J.I.L. 101, 104 (1987); Michael Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 Colum. J. Transnat'l L. 885, 921 (1999) (quoting the ICJ in *Nicaragua v. U.S.*).

³⁴⁰ D'Amato, *supra* note 339, at 104.

³⁴¹ *Id.*

³⁴² *Id.*

divergence of formerly coincident laws.³⁴³ Hence, state practice since 1945, whether considered formative of new customary international law or as constituting interpretation of the Charter under the subsequent-practice rule, has drastically altered the meaning and content of Article 2(4).³⁴⁴

There have been many recent cases in which the rule against the use of force was probably violated.³⁴⁵ In each of these cases, states employed military force while claiming to have legal justification in the Charter.³⁴⁶ Unilateral uses of force since 1945 are replete with examples that many commentators argue were justified on humanitarian intervention grounds.³⁴⁷

The Vienna Convention on the Law of Treaties incorporated the international legal principle that when interpreting a treaty, one should take into account subsequent practice.³⁴⁸ Because the practice of states since passage of the Charter has been to use force unilaterally to protect others from egregious human rights abuses, the Charter should be interpreted to allow such an exception to the prohibition on the unilateral use of force.³⁴⁹ The majority of scholars agree that at least some unilateral uses of force for humanitarian purposes are justified and that humanitarian intervention in some form is useful, accepted, and legal.³⁵⁰

From the day that American Presidents and Secretaries of State emerged as actors in world politics, they became important spokesmen for international law, and contributed disproportionately to its development.³⁵¹ NATO's air campaign in the FRY is a significant "practice" of numerous influential states supporting a right of forcible humanitarian intervention.

As Ove Bring notes, whether that practice contributes to the creation of an exception to the Article 2(4) restriction on the use of force or is considered an exceptional deviation from international law, depends on whether the NATO nations articulate a legal justification supporting such an exception or simply remain silent.³⁵² Unless the U.S. leads, the silence that has existed for almost one year will probably continue.

D. Sovereignty

In the 20th century sovereignty resides not in the organs of government, but rather in the people (popular sovereignty).³⁵³ Thus when the government acts, it does so on behalf of the people.³⁵⁴ When a government acts contrary to the just interests of its citizens (i.e., by violating their human rights), it acts in violation of the sovereignty delegated from them, it forfeits back to them any authority it may have, and they can overthrow the illegitimized government whose

³⁴³ *Id.* at 105; Schmitt, *supra* note 339, at 921 (quoting the ICJ).

³⁴⁴ D'Amato, *supra* note 339, at 105; D'Amato *supra* note 338, at 664 n. 24 (citing Franck).

³⁴⁵ Schachter, *supra* note 94, at 117 (listing examples).

³⁴⁶ *Id.* at 117-8.

³⁴⁷ Burmester, *supra* note 98 at 300.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ Fidler, *supra* note 98, at n. 40 (quoting Eugene Rostow in n. 40).

³⁵² Bring, *supra* note 5.

³⁵³ Petersen, *supra* note 129. See also *supra* Part V(C).

³⁵⁴ Petersen, *supra* note 129.

identity as sovereign ceases to exist.³⁵⁵

The theory of "popular sovereignty" has also been called the "moral forfeiture" theory under which a state's sovereignty is contingent upon some minimum standard of treatment of its subjects.³⁵⁶ Should state action fall below this minimum standard, for example by flagrantly violating the human rights of those within its borders, the state forfeits its sovereignty entirely and becomes subject to external interventions.³⁵⁷

UNSC Resolution 1244 resolved to end the "grave humanitarian situation in Kosovo"³⁵⁸, noted that the situation in the region constituted a "threat to international peace and security"³⁵⁹, and demanded that the FRY immediately end the violence and repression in Kosovo.³⁶⁰ Under the "popular sovereignty" or "moral forfeiture" theory, UNSC Resolution 1244 should be sufficient evidence that the FRY government forfeited its legitimacy, at least with respect to the citizens of Kosovo, thus subjecting it to intervention by NATO.

IX. CONCLUSION

The main security threats in today's world are not to be found in the relations between states but concern threats from governments towards their own citizens.³⁶¹ International law is slowly adapting to these developments by establishing new global and regional structures for peacekeeping and peace enforcement.³⁶² The enunciation of new doctrines for the use of these structures would be helpful in the progressive development of the law.³⁶³

There is a legal maxim that hard cases make bad law. Kosovo was a hard case. The atrocities made it clear that morally, ethically, and politically, intervention was necessary. However, it was equally clear that only a UNSC mandate could provide legal authority to use force and Russia would veto any such mandate. Policy makers chose to intervene and, in retrospect, appear to be vindicated if not applauded.

Policy makers must now make another decision about their use of force in Kosovo: whether to let the practice of the 19 NATO nations be quietly forgotten and considered a one-time temporary deviation from the law on the use of force, or to provide, through official statements, the *opinio juris* necessary to establish their actions in Kosovo as supporting an emerging customary law right of humanitarian intervention. Alternatively, their official statements could articulate a re-interpretation of the U.N. Charter creating an exception to the Article 2(4) limits on the use of force for humanitarian intervention. Regardless of the alternative chosen, it must be emphasized that policy makers, not lawyers, must decide.

³⁵⁵ *Id.*; Schmitt *supra* note 97, at 98; Kingsbury, *supra* note 140.

³⁵⁶ Burton, *supra* note 174, at 435-6.

³⁵⁷ *Id.* at 436 (but note that this is still confined to scholarly debates); Kresock, *supra* note 297, at 235; Kingsbury, *supra* note 140.

³⁵⁸ S/RES/1244 (1999) June 10, 1999, preamble paragraph 5.

³⁵⁹ *Id.* at preamble paragraph 13.

³⁶⁰ *Id.* at paragraph 3.

³⁶¹ Bring, *supra* note 5.

³⁶² *Id.*

³⁶³ *Id.*